

**KURUPPUARACHCHI
V.
ANDREAS**

**SUPREME COURT
G.P.S DE SILVA, C.J.
KULATUNGA, J.
RAMANATHAN, J.
S.C. 82/94
C.A.LA.230/93
D.C. Mt.LAVINIA No 93/91 (3)
JANUARY 09, 1995.**

Civil Procedure - S.93(2) amended by Act No.9 of 1991 - Divorce - Malicious - Desertion Amendment of Answer - New Cause of Action - Laches.

The Plaintiff sued the Defendant for a Divorce on the ground of Malicious Desertion. The defendant-appellant in her answer denied the several averments in the plaint and sought the dismissal of the action. After the second date of Trial, the Defendant-Appellant moved to amend the Answer, by the amended answer the Defendant-Appellant pleaded a new cause of Action on the ground of Adultery with the 2nd Defendant who was to be added.

The District Judge rejected the Defendant's application to amend, the leave to appeal application made to the Court of Appeal was dismissed, on appeal.

Held:

1. The amendment introduced by Act No. 9 of 199 -S. 93 (2) -was clearly intended to prevent undue postponement of trials by placing a significant restriction on the power of the Court to permit amendment of pleadings' on or after the day first fixed for Trial'.
2. It is clear that the Defendant-Appellant was well aware of the fact that the Plaintiff was living in adultery at the time the answer was filed, but has chosen not to rely on that ground in her answer.
3. While the Court earlier 'discouraged' amendment of pleadings on the date of trial, now the Court is precluded from allowing such amendments save on the ground postulated in the sub-section.

AN APPEAL from the Judgment of the Court of Appeal.

case referred to:

1. *Daryanani v. Eastern Silk Emporium Ltd.* 64 NLR 529 at 534.

D.R.P. Gunatillake with S.A.D.S. Suraweera for Defendant-Appellant.
S.S. Sahabandu for the Plaintiff-Respondent.

Cur. adv. vult.

February 10, 1995

G.P.S. DE SILVA, C.J.

The Plaintiff sued the Defendant for a divorce on the ground that the Defendant had maliciously deserted him. The Defendant in her answer filed on 17.6.92 denied the several averments in the answer and sought the dismissal of the action. The case was first fixed for trial on 30.10.92 and the second date on which the case was fixed for trial was 15.1.93. It was after the second date on which the case was fixed for trial that the Defendant moved to amend her answer. The amended answer is dated 10.6.93. By the amended answer the Defendant pleaded a new cause of action on the ground of adultery with the 2nd Defendant who was to be added as a party to the action. The point that needs to be stressed is that in paragraph 7 (c) of the amended answer the Defendant averred that the Plaintiff had been living in adultery with the party sought to be added for the past several years.

The District Judge rejected the Defendant's application to amend her answer. The Defendant moved the Court of Appeal for leave to appeal against the order of the District Judge. Having regard to the provisions of section 93 (2) of the Civil Procedure Code as amended by Act No. 9 of 1991, the Court of Appeal affirmed the order of the District Judge. The Defendant has now preferred an appeal to this court.

Section 93 (2) as amended reads thus:-

"On or after the day first fixed for the trial of the action and before final judgment, no application for the amendment of any pleading shall be allowed unless the court is satisfied, for reasons to be recorded by the court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches."

The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trials by placing a significant restriction on the power of the court to permit amendment of pleadings "on or after the day first fixed for the trial of the action." An amendment of pleadings on the date of trial, more often than not, results in the postponement of the trial. In this connection it would not be inappropriate to refer to the observations of Sansoni, J. (as he then was) in *Daryanani v Eastern Silk Emporium Ltd.*,⁽¹⁾ "I have also always understood the rule to be that an amendment should be applied for as early as possible and as soon as it becomes apparent that it would be necessary. Only in this way can unnecessary delays be avoided. Applications for amendment at the trial have always been discouraged, because the other party has been put to the expense and trouble of getting ready for trial." In the same case, in a separate judgment, L.B. de Silva, J., made similar observations "..... convenience and the interests of justice demand that an amendment of pleadings should be made as early as possible It has been the normal practice of our courts to allow such amendments before the hearing." (at page 538). The learned Judges were dealing with section 93 prior to its amendment, and these observations were made in the context of the submission of counsel that an amendment of pleadings is not permitted prior to the hearing of the action. The relevance of those observations for present purposes is that they indicate the rationale underlying the amendment introduced by Act No. 9 of 1991. While the Court earlier "discouraged" amendment of pleadings on the date of trial. Now the court is precluded from allowing such amendments save on the ground postulated in the subsection.

Turning now to the averments in the amended answer, it is clear that the defendant was well aware of the fact that the plaintiff was living in adultery at the time the answer was filed, but she has chosen not to rely on that ground in her answer. After the second date of trial, she is seeking to amend the answer by including a cause of action based on adultery. In these circumstances, the conclusion of the Court of Appeal, that the defendant is guilty of laches and that the amended answer has to be rejected in terms of section 93 (2) (as amended) must be affirmed.

Mr. D.R.P. Gunatilake for the Defendant-Appellant strenuously contended that the Defendant refrained from pleading adultery in the answer as her intention was to save the marriage in the interest of the children. Her intentions were no doubt laudable and deserving of sympathy, but if such a plea is admissible the purpose of the amendment would, to a great extent, be defeated.

For these reasons, the appeal fails and is dismissed, but without costs.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.